

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 366 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

=====

1. Whether Reporters of Local Papers may be allowed
to see the judgements? No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?
No

STATE OF GUJARAT

Versus

THAKARDA BHIKHAJI NATHAJI

Appearance:

Mr. S.R.Divetia, A.P.P. for the appellant
Respondents served.

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 26/04/99

ORAL JUDGEMENT

(Per : Panchal, J.)

The acquittal of the respondents of the offences
punishable under sections 302, 307 read with section 34
of the Indian Penal Code and section 135 of the Bombay

Police Act recorded by the learned Additional Sessions Judge, Mehsana vide judgment and order dated February 7, 1992 rendered in Sessions Case No. 93/87 is subject matter of challenge in present appeal, which is filed under section 378 of the Code of Criminal Procedure, 1973.

2. The prosecution case in brief is that on March 29, 1987 on hearing uproar, the complainant rushed to the scene of offence towards his thrashing floor and found that accused nos. 1 & 2 had dharia in their hands; whereas accused no.3 had a stick in his hand. The complainant further found that his brother Chhaganji was lying injured in bleeding condition on the ground and son of the complainant named Sardarji was bleeding from the head; whereas accused were fleeing from the scene of offence. According to the prosecution, the complainant raised shouts, as a result of which Thakor Baldevji Ramataji and others gathered at the scene of offence. Sardarji, who is son of the complainant, is alleged to have stated before the complainant that the accused had assaulted Chhaganji and when he tried to intervene, he was given stick blow on the head by respondent No.3. Injured Chhaganji as well as injured Sardarji were removed to Civil Hospital, Kalol and as condition of Chhaganji had deteriorated, the injured were referred to Civil Hospital, Ahmedabad where injured Chhaganji succumbed to injuries during the course of treatment. Complainant Fulaji Ataji had been to village Meda-Adaraj where the incident had taken place and there from had gone to Bavlu Police Station for lodging complaint. The complaint was lodged, according to the prosecution, at about 6.00 A.M. on March 30, 1987 and was registered at the police station as I. C.R. No. 26/87 of Bavlu Police Station for the offences punishable under sections 302, 307, 326, 324, 323 read with section 34 of the Indian Penal Code. The complaint was investigated by Shankerji Navalram Gadhvi, who was discharging duties as Police Sub Inspector, Bavlu Police Station. The investigating officer visited the place of offence and recorded statements of those who were found conversant with the facts of the case. The respondents were arrested on April 2, 1987 and incriminating weapons used in commission of offences were recovered pursuant to information provided by the respondents. Before the First Information Report was lodged at Bavlu Police Station, inquest on the dead body was held by Head Constable, Shahibaug P.S. Chowky. The Head Constable who had prepared inquest report, had sent the dead body for postmortem examination and autopsy on the dead body was performed by Dr. Sunilkumar Madanlal Lad. The

increminating articles which were seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On receipt of necessary report from the competent authorities and after completion of investigation, the respondents were chargesheeted for the offences punishable under sections 302, 325, 326 read with section 34 of the Indian Penal Code and section 135 of the Bombay Police Act. The offence under section 302 I.P.C. is exclusively triable by the Court of Sessions and, therefore, the case was committed to Sessions Court, Mehsana for trial. The learned Additional Sessions Judge to whom the case was made over for trial, framed charge against the accused at Exh.1 for the offence punishable under sections 302, 307 read with section 34 of I.P.C. and section 135 of the Bombay Police Act, 1951. The charge was read over and explained to the respondents, who pleaded not guilty to the same and claimed to be tried. Therefore, in order to prove its case, prosecution examined, (1) complainant Fulaji Ataji, PW 1, Exh.16, (2) Udaji Ataji, PW 2, Exh.18, (3) Patel Suresh Amrutlal PW 3, Exh. 19, (4) Jashwantbhai Purshottamdas PW 4, Exh.21, (5) Babubhai Dhulabhai Prajapati, PW 5, Exh.24, (6) Kashammiya Usmanmiya PW 6 Exh.26, (7) Ranchhodji Dolaji, PW.7, Exh.30, (8) Sardarji Fulaji, PW.8, Exh.31, (9) Haren Himatlal Parikh, PW 9, Exh.32, (10) Hayatkhan Abdulkhan PW.10, Exh.34, (11) Dr. Sunilkumar Madanlal Lad, PW 11, Exh.39, and (12) Investigating Officer Mr. Shankerlal Navalsinh Gadhvi, PW.12, Exh.41. The prosecution also produced documentary evidence, such as, inquest report at Exh.12, complaint filed by Fulaji Ataji at Exh.17, panchnama of place of offence at Exh.20, map of scene of offence at Exh.25, entry of case diary at Exh.27, medical certificate regarding injuries of injured Sardarji at Exh.33, postmortem notes of deceased Chhaganji at Exh.40, report received from Forensic Science Laboratory at Exh.43 etc. to bring home guilt to the respondents. Before examination of investigating officer, an application at Exh.35 was submitted by the respondents requesting the court to recall the complainant, as the respondents wanted to put defence case to the said witness. However, the said application was rejected by the learned Judge vide order dated December 27, 1991. The respondents also submitted an application at Exh.44 requesting the Court to issue summons under section 91 of the Code of Criminal Procedure, 1973 to the concerned employee of Civil Hospital, Ahmedabad for production of medical papers pertaining to injuries of Sardarji wherein history of assault as narrated by the injured was noted down by the medical officer. The said application was allowed by the learned Judge and summons was accordingly issued on

January 24, 1992, pursuant to which medical papers with history of assault noted down on the papers as narrated by injured Sardarji were produced at Exh.45/1. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the respondents generally on the case and recorded their further statements under section 313 of the Code of Criminal Procedure, 1973. In their statements, the respondents denied the case of prosecution. However, no evidence in defence was led by any of the respondents.

3. On appreciation of evidence led by the prosecution, the learned Judge observed that evidence led by the complainant to indicate that he had gone to Bavlu Police Station for the purpose of giving complaint, is not reliable, inasmuch as the evidence shows that the complaint was given at Meda-Adaraj Outpost. The learned Judge deduced that as per the complainant, no policeman had visited village Meda-Adaraj on March 30, 1987 and, therefore, case of prosecution to the effect that investigation was carried out on March 30, 1987 was doubtful. The learned Judge held that the evidence of investigating officer reveals that the complaint was filed before Head Constable, Shahibaug P.S. Civil Chowky and, therefore, the whole case of the prosecution was not reliable at all. The learned Judge noted that presence of so-called eye witness Udaji Ataji at the time of incident was not referred to by complainant Fulaji Ataji either in his substantive evidence before the Court or in his complaint and, therefore, the case that Udaji Ataji had witnessed the incident was not proved. On appreciation of medical evidence and deposition of the injured, the learned Judge concluded that evidence of injured was not corroborated by the medical evidence and he had not witnessed the incident at all. The learned Judge noticed that the report as contemplated by section 157 of the Code of Criminal Procedure, 1973 was forwarded to the concerned learned Magistrate after unreasonable delay and as delay was not explained at all, prosecution case was not believable. In ultimate analysis, the learned Judge gave benefit of doubt to the respondents by judgment and order dated February 7, 1992, giving rise to present appeal.

4. Mr. S.R.Divetia, learned Counsel for the State Government submitted that the evidence of injured establishes that he was present at the scene of offence and had received injuries at the hands of respondent no.3 and, therefore, the respondents ought to have been convicted by the Trial Court of the offence with which they were charged. The learned Counsel emphasised that

medical evidence on record corroborates not only the injured, but also the complainant and, therefore, acquittal recorded by the Trial Court should be set aside. What was claimed was that on the totality of the evidence led by the prosecution and on correct appreciation of evidence, accused ought to have been held guilty and convicted for the offences punishable under sections 302, 307, 34 of the Indian Penal Code and section 135 of the Bombay Police Act.

5. We have been taken through the entire evidence on record by the learned A.P.P. In our view, there is no substance in any of the contentions urged by the learned Counsel for the appellant and the appeal cannot be accepted. The complainant in his evidence has claimed that he had gone to Bavlu Police Station for the purpose of lodging complaint and the information given by him was registered at Bavlu Police Station; whereas the evidence of Constable Hayatkhan Abdulkhan recorded at Exh. 34 establishes that complainant Fulaji Ataji had given his complaint at Meda-Adaraj Outpost and the evidence of investigating officer shows that the First Information Report was lodged at Civil Chowky Outpost of Shahibaug Police Station, Ahmedabad. Thus, neither consistent nor cogent evidence is led by the prosecution regarding filing of the complaint at all. The doctor who performed autopsy on the dead body is examined at Exh.39. He has categorically stated in his evidence that he had received dead body of Chhaganji Ataji for postmortem from Shahibaug Police Station and the postmortem notes produced at Exh.40 indicates that dead body was brought by Head Constable, P.S. Civil Chowky. It means that some information regarding commission of cognizable offence in respect of deceased Chhaganji was conveyed at Outpost set-up at Civil Hospital. The inquest on the dead body was also held by Head Constable, Civil O.P.D., Shahibaug Police Station on March 29, 1987 between 9.30 P.M. to 10.00 P.M. in presence of Ramaji Sendhaji Thakor and Ranchhodji Dolaji Thakor, who are residents of village Meda-Adaraj. The contents of inquest report read with postmortem notes clearly establish that Dr. H.H.Parikh, who had treated Chhaganji, had conveyed necessary information to police constable Vakhatsinh after injured Chhaganji succumbed to injuries and police constable Vakhatsinh had in turn given the necessary information to Head Constable, Civil O.P.D., Shahibaug Police Station, who had held inquest on the dead body. Under the circumstances, there is no manner of doubt that the so-called F.I.R. lodged by complainant Fulaji Ataji at Bavlu Police Station is not F.I.R. regarding commission of cognizable offence and is hit by section

162 of the Code of Criminal Procedure, 1973. It is relevant to note that the F.I.R. given by Head Constable, Shahibaug P.S. Civil Chowky is not brought on record of the case by the prosecution and, therefore, necessary adverse inference will have to be drawn against the prosecution for suppressing material evidence from the Court. The complainant asserted in his deposition that no investigation was carried out by the police at village Meda-Adaraj on March 30, 1987, but record of the case indicates that panchnama of place of occurrence was prepared on March 30, 1987 and the said place was pointed out by the complainant himself. Thus, it becomes apparent that the complainant has no regard for truth and has made contradictory statements making his evidence unreliable. The learned Judge has rightly held that injured Sardarji was not present, nor witness Udaji Fulaji was present at the time when the incident had taken place. Though the injured claimed in his evidence before the Court that he was given stick blow by respondent no.3, the history stated by him at Civil Hospital, Kalol indicates that he was assaulted by two persons with 'Dantari'. It may be stated that 'Dantari' is an instrument for breaking clods (cake or lump of earth or clay) on ploughed field. The history of assault as narrated by the injured was that he was assaulted by two persons and not by one as claimed by him before Court and that he was not assaulted by a stick, but by a 'dantari'. Moreover, it was also noticed that he had sustained injury on his palms. In his substantive evidence before Court, this witness has not given any explanation as to how he received injury on his palms. The injured witness further claimed in his deposition that he was given one stick blow by the respondent no.3; whereas the medical evidence on record clearly establishes that more than one blows were given to the injured. If in fact the injured had received injuries during the course of incident, he would not have failed to narrate the number of blows given by respondent no.3 to him. Thus, there is no manner of doubt that his evidence is totally inconsistent with that of medical evidence on record and, therefore, his evidence is untrustworthy. As observed earlier, complainant Fulaji Ataji has not referred to presence of so-called eye witness Udaji Ataji either in his substantive evidence before Court or in his so-called F.I.R. which was lodged according to him, at Bavlu Police Station. If Udaji Ataji who is real brother of the complainant, had witnessed the incident in question, the complainant would not have failed to make reference to this vital fact either in his deposition before Court or in the complaint lodged by him. Apart from these glaring defects in the

prosecution case, there is one more factor which requires to be noticed. Though the incident had taken place on March 29, 1987 at 6.00 P.M., report as required by section 157 of the Code of Criminal Procedure, 1973 was forwarded to the concerned learned Magistrate only on April 1, 1987 at about 1.30 P.M. There was delay of about 50 to 55 hours in forwarding the report to the learned Magistrate, but no explanation is offered either by the investigating officer or by constable Hayatkhan as to why the report was not sent forthwith to the learned Magistrate. This raises a doubt that after due deliberation the case against the respondents was made out and that too after holding of inquest on the dead body. Though it is not necessary for the prosecution to prove motive in a case of direct evidence, but in this case failure of the prosecution to establish motive assumes importance, as the whole prosecution case and the conduct of the witnesses is not only free from doubt, but highly unnatural. On the totality of the facts and circumstances of the case, we are of the opinion that the learned Judge has appreciated the evidence in correct prospective and n.J

interfere with the well-founded acquittal of the respondents recorded by the learned Judge.

6. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhary, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has

failed to convince us to take the view contrary to the one already taken by the learned Judge and therefore, the appeal is liable to be rejected.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal articles to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(patel)